Moreover, the FCC suggested, franchising authorities could not settle rate issues with operators.

The FCC's determination that operators cannot be restricted from retiering because of preexisting requirements is not consistent with federal law. Nothing requires basic service to be limited to PEG access and broadcast channels. In fact, the CPCA envisions that basic service might include other channels as well. 47 U.S.C. § 543(b)(7)(B). Any claim that Congress' desire to ensure a low-priced basic tier warrants preempting all tier requirements is undercut by the fact that (1) operators have discretion (under the Act and FCC rules) to provide a service-laden (and expensive) basic tier, and (2) the FCC's decision to apply the same method of regulation to basic and non-basic tiers [illegible] requirements "for broad categories of video programming or other services" in post-1984 franchises, and any service requirement in pre-1984 franchises. The FCC itself recognizes that franchising authorities may specify on which tier PEG channels must be carried. Report and Order, ¶ 160.[21] The Cable Act thus does not require preemption of franchise service requirements, and the law permits franchising authorities to impose and enforce certain service requirements for particular tiers. Petitioners therefore ask the FCC to reverse its determination that service requirements contained in a franchise are unenforceable.[22]

Even assuming that the FCC correctly determined that preexisting rate and service agreements are voided by the CPCA, there is no reason to prohibit future agreements. The FCC's conclusions were based on the fact that (1) 47 U.S.C. § 543(i)

CPCA does not prevent an operator from entering into an enforceable agreement to change a certain rate or certain services, because such agreements are contractual in nature, and not regulatory in any meaningful sense. This is consistent with traditional regulatory principles that permitted parties to resolve issues through contract.[23] At most, § 543(j) preempts rate agreements entered into between July 1, 1990 and the date the CPCA was enacted.

In fact, rate and service agreements may work to the benefit enforceable. They are being encouraged in this belief by some FCC staffmembers, who are publicly urging franchising authorities to enter into agreements with operators rather than seek certification at the FCC. The FCC must make clear whether such agreements will be enforceable as the FCC interprets its rules and the law.[24] To the extent the FCC is concerned that such a ruling may lead to agreements that permit operators to charge unreasonable rates, there is a simple solution: namely, the FCC could require that any agreement be made available to the public, and that the public be given an opportunity to comment, and the FCC could reserve the right to review and invalidate any agreement it determines is not in the public interest.

Respectfully submitted,

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[24] Rate agreements that are reached after a franchising authority is certified are a separate matter, and should be valid and enforceable (regardless of whether pre-certification agreements are deemed enforceable). For example, a franchising authority that disagreed with an operator as to the appropriate depreciation rates included in a cost of service filing should not be required to litigate the issue to the bitter end, but should be able to agree to appropriate rates, subject to public comment and review as to whether the settlement was arbitrary and capricious.